No. 12,569

IN THE

United States Court of Appeals

For the Ninth Circuit

ALFRED HEADY and ESTHER HEADY, doing business as Heady Hotel,
Appellants,

vs.

LAWRENCE E. SLAVIN,
Appellee.

Appeal from the District Court of the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

Rules

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JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and Federal Rules of Civil Procedure.

JUDGMENT BELOW.

A judgment was entered in the District Court at Anchorage, Alaska, on the 24th day of February, 1950 (TR. 20), based upon a verdict rendered by the jury on February 9, 1950 (TR. 8), from which this appeal is taken.

STATEMENT OF FACT.

The plaintiff in the Court below, Lawrence E. Slavin, filed his complaint in the District Court, Third Judicial Division, on September 7, 1949, wherein he prayed to recover judgment against the defendants, Alfred Heady and Esther Heady, doing business as Heady Hotel, at Homer, Alaska, in the sum of one thousand two hundred eighty dollars ($1,280.00), with interest and five hundred dollars ($500.00) attorney's fees. The charging part of the complaint is: "The plaintiff worked as a carpenter for the defendants in the construction of defendants' hotel, over a period of sixteen forty hour weeks, from the 2nd day of October, 1947, to the 23rd day of January, 1948, inclusive, at the special instance and request of the defendants, and *for the stipulated wages of $2.00 per hour, for each and every hour so worked by the plaintiff, and in addition to the said $2.00 per hour, plaintiff was to receive board and lodging from defendants,* which board was provided by the said defendants. (See paragraph I, of the complaint; TR. 2.) (Emphasis ours.)

To this complaint, the defendants answered, denying that they agreed to pay the plaintiff anything for said work, and alleged that the plaintiff offered to work and stated that he would board and room with the defendants, that he needed something to do, and that no price for work was ever agreed upon, except that the defendants acting by and through Alfred Heady, told the plaintiff that they had no money to pay him for labor; that he (Alfred Heady), and Tommy were going ahead and build it and the plaintiff insisted on helping and stated that he needed a place to live and without any agreement for the payment of any money whatsoever, he did commence working and did work at intervals, never a full week, never a full day, only worked as he saw fit and was never called to do any particular thing. When this answer was filed, which was on October 4, 1949, it was served on opposing counsel and on October 19, 1950, a reply was filed that was signed by one of the attorneys, for plaintiff, R. J. McNealy, and was verified by the said R. J. McNealy, and this reply denied each and every material allegation made by the defendants in their answer, which is not in full accord and agreement with plaintiff's complaint, except defendants' statement: "No price for work was agreed upon", and in that plaintiff understood he was to have going carpenter wages, and in this reply prayed to recover as in the complaint filed. This reply was filed without permission of the Court having been obtained, and without any order directing its filing and was surplusage, and no part of the pleadings in the case.

EVIDENCE.

Lawrence E. Slavin was called as a witness and testified that he had lived in Homer, Alaska, since 1920; that he was a carpenter and fisherman; had been a carpenter for 20 years; had occasion to work for the defendants, Mr. and Mrs. Heady. (TR. 37.) He began work October 2, 1947, and worked until January 22 or 23, 1948; he worked *six weeks.* Then you find the following questions and answers on page 37 TR.:

"Q. Do you know how many weeks that was?

A. Six weeks. (4)

The Court. I missed part of the answer. You said you began work——

A. October 2nd.

The Court. Until when?

A. January 23.

Q. (by Mr. McNealy). Did I understand you correctly that you worked from the 2nd of October until the 23rd of January?

A. Yes.

Q. That is more than six weeks?

A. It may be more than six weeks.

Q. Did you, or did you not allege in your complaint that you worked sixteen weeks?

A. Well, yes, it is sixteen weeks.

Q. How many hours a week did you work?

A. Forty hours."

That he put in doors and windows, worked on the sub-floor and stairways; that he was asked this question (TR. 38): "What did they pay you for the sixteen weeks' work at forty hours per week?"

To this an objection was stated as follows:

"Mr. Bell. I object to the question. It is not based upon the prior evidence and assuming something not in evidence.

The Court. Overruled.

Mr. Bell. Exception."

"Q. What did they pay for the 16 weeks work of forty hours per week?

A. All I received at the time was my board."

He roomed with the other fellow in the cabin. Headys furnished the board. Then these proceedings took place (TR. 39):

"Q. Prior to the time you went to work for the Headys, for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter.

Q. You have stated, I believe, that you have twenty years experience as a carpenter?

A. Yes, sir.

Q. How much per hour, if you remember, did Squeaky Anderson pay you?

Mr. Bell. Object as incompetent, irrevelant, and immaterial. This is not a suit on *quantum meruit,* but on direct contract so pleaded.

The Court. That is the way it was pleaded in the complaint. The reply may——

Mr. McNealy. Your Honor, in the reply we did state that there was no actual price agreed

upon. It was an error on my part in drawing the complaint in stating that there was a stipulated amount.

The Court. What is the purpose of this question, to prove the going carpenter wages?

Mr. McNealy. Yes.

Mr. Bell. That wasn't the question.

The Court. The objection is overruled.

Q. (by Mr. McNealy). Go ahead and answer the question.

A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenters wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your Honor, I move to strike the answer as not responsive to the question, and further that it is outside the pleadings and not within the issue.

The Court. Motion is denied."

Then further down on page 40 TR., and continuing on page 41, you find the following record:

"Q. Now, Mr. Slavin, you have stated that you worked for the Headys on the hotel. Will you explain to the Court and to the Jury all the circumstances surrounding your employment with the Headys between the dates of October 2nd and January 23rd?

A. Well, I came to Homer the 2nd of October. Tommy was working in the hotel, and I said to Tommy, 'Give me a hammer and I will help you.'

The Court. Who was that?

A. Tommy Wickland. He was working with Al at that time, so I proceeded to help him that afternoon and evening. I told them that evening at supper I could help them for a few days. The next day they gave me the windows and doors to hang. I proceeded with that. At the time they were working on a water system and hauling coal. The second day I was there Al told me at that time he couldn't see his way clear then to pay me wages, but he was keeping track of the time and he would pay me at some later date. So on the strength of that I sent and got my tools. From then on I was just working at the windows and doors the sub-flooring and one thing or other for a period of about six weeks, and I worked along in the building, got it enclosed for cold weather. That is the way it carried on until the latter part of January."

Then on page 42 TR., you find the following questions and answers:

"Q. Explain, if you can, why you had your tools shipped from Seldovia over to Homer?

A. As I stated, on the strength of Al's statement that he needed someone and said he couldn't pay me then, but he was keeping track of the time and at a later date he would reimburse me, so that is the reason I sent for the tools."

Then again on page 43 TR., you find these questions and answers:

"Q. By your work for the defendants, Mr. and Mrs. Heady, did they get into the hotel any sooner than they would otherwise?

Mr. Bell. Objection, calling for a conclusion of the witness.

The Court. Overruled.

Q. Did they, by reason of your work, get into the hotel sooner than they would otherwise?

A. Yes (11)."

He then testified that he put in some windows and doors and did the biggest part of the sub-floors and finished up some stairways and living quarters. On cross-examination, he testified that he worked for Squeaky Anderson in the fall of the year, constructed some buildings, did some fishing, had worked for Squeaky that Spring; worked at the Post as a carpenter in 1943; came to Homer October 2; was planning on being around Homer to get some surveying done, surveying of a homestead, his Father's homestead, intended to stay around Homer while the surveying was being done; there was a house on the homestead but there was a family living in it. He knew that Al (Heady) was trying to build a log building for a hotel. He knew Tommy Wickland, Tommy was a carpenter. When he first went there Mr. Heady was not present. He said to Tommy, "Give me a hammer, and I will help you out"; that Tommy got him a hammer and he did help him. That was about two o'clock. He had come from Seldovia that day; intended to stay in Homer for a while. Worked until about five o'clock that evening. It was pretty cold. It was beginning to get cold. Had his evening meal at the Heady's; had a talk with

them that evening. He was a friend of the Headys. Told Mr. and Mrs. Heady he was going outside, and had to hang around until he could get some surveying done. Mr. Heady told him he had no money to pay him with. That he and Tommy were just building it themselves. He didn't say anything about price. He told them, "I told him, I would be glad to give him a few days work". (TR. 48.) Then he was asked this question and gave this answer:

"Those first few weeks you didn't intend to charge him?"

"I didn't think there was any charge." (TR. 48.)

Then on page 49 TR., you find the following questions and answers:

"Q. Where were you going outside?

A. Well, I don't know as—I generally visit around Seattle and then go over in the country where I was born and raised and Lord knows where I would have gone to.

Q. You are a single man?

Q. Never been married?

A. No.

Q. Did you live on your father's homestead a good long time?

A. Yes.

Q. How long?

A. Ten years.

Q. How far is that from Homer?

A. About two and a half miles east of the Heady Hotel.

Q. Did you finally go outside?

A. Yes.

Q. When did you go?

A. I believe it was the 5th of February.

Q. How did you go?

A. I flew out.

Q. Did you stay with the Headys until you went outside?

A. I boarded there. I was staying with Tommy Wickland.

Q. Who furnished the beds?

A. I furnished my own bedding.

Q. You had sheets?

A. My own bedding—my own sheet blankets.

Q. Who furnished the bed?

A. I believe the Headys. That was at Tommy Wickland's.

Q. How far was Tommy's place from where the Headys lived?

A. Oh, probably 300 yards.

Q. And you stayed over at Tommy Wickland's and you had your meals at the Heady's place?

A. Yes.

Q. Who did your laundry?

A. Every bit of laundry I had I did it myself.

Q. You are sure Mrs. Heady didn't do it?

A. I believe it was just before Christmas she said she would be glad to do my laundry. It was a kind of shack and drying conditions weren't good.

Q. After you got to the hotel she did do it for you?

A. We did it together.

Q. Sometimes you would help her with the laundry?

A. Yes.

* * * * * * *

Q. You did help them with the car—the truck?

A. Yes.

Q. Some days it was too bad to work?

A. No, I was inside working and enclosing the building.

Q. Did you ever use the truck for your own uses?

A. Yes, maybe half a dozen times.

Q. You did have the engineer survey your place?

A. Yes, I think we was out there a day or day and a half.

Q. Did you stay at the home property at that time?

A. No.

Q. You drove back and forth?

A. Yes.

Q. You drove Mr. Heady's truck for that?

A. I believe I used it.

Q. Did you do any hauling otherwise with his truck?

A. I don't recall doing any hauling only there was one time I went to the dock to pick up some oil. At that time Heady had about four drums of oil himself, oil I had bought in Seldovia at one time and brought back.

Q. For whom?

A. For Heady and for myself.

Q. What did you do with that oil?

A. It set there by the hotel until last fall and I went and got it.

Q. That was outside by the hotel?

A. Yes.

Q. The Heady Hotel?

A. Yes."

Then on page 52 TR., you find these questions and answers:

"Q. Did you work during Christmas week?

A. Yes, I believe we did.

Q. Stop just a minute?

A. I would say yes.

Q. Did you work on Christmas day?

A. No.

Q. Did you work New Years day?

A. No.

Q. Did you work the second week in January?

A. I suppose I did.

Q. You just don't remember?

A. I was working practically all the time I was there.

Q. Were you there at Thanksgiving?

A. Yes.

Q. Did you work Thanksgiving day?

A. No.

Q. You had Thanksgiving dinner at the Heady place, didn't you?

A. I tell you I don't recall that. There was one holiday we went over to Carl Byers and I forget, but I think that was Christmas.

Q. You and the Headys were very close friends, weren't you?

A. Yes, we were."

Then on page 53 TR.:

"Q. Did you tell Mrs. Heady this, or this in substance, that you would like to build that stairway that you had always wanted to?

A. Yes.

Q. You wanted to build it a certain way that you had in mind?

A. Yes.

Q. And she said all right?

A. I don't believe it was Mrs. Heady. I believe it was Al, we always talked things over with.

Q. He said go ahead?

A. Yes. He turned it over to me. He always seemed satisfied to.

Q. He always let you do it just as you wanted to?

A. Yes."

Then on page 56 TR., you find these questions and answers:

"Q. You had your ground surveyed out in the country during that time?

A. Yes.

Q. Were you out there some time when you were having that survey?

A. About a day and a half."

Then on page 59 TR. we find these questions and answers:

"Q. You stayed with the Headys until you went outside, didn't you?

A. Yes.

Q. And you stayed at the same place and had the same bed that you had?

A. Yes.

Q. They furnished your board?

A. Yes.

Q. Did you ever move in the hotel with them?

A. In the spring after I came back from the outside.

Q. Did you pay them for your accommodations then?

A. I don't believe there was anything asked for that. They put up a couple of cots and we furnished our own mattresses.

Q. Who stayed there besides you?

A. My nephew.

Q. How long did you stay?

A. The first night I arrived I stayed with Tommy Wickland and would have continued staying with Tommy only Al told me a story about Tommy and invited me over there.

Q. He invited you?

A. Yes.

Q. And your nephew came over with you?

A. Yes.

Q. How long did you stay?

A. I couldn't say exactly. I don't know just when we left to go fishing, sometime in May, I believe.

Q. And he never charged you anything for board?"

Then on page 62 TR.:

"Q. (by Mr. Bell). You told Mr. McNealy that there was a stipulated amount of two dollars per hour to be paid you?

A. That is what I asked.

Q. You told him that?
A. Yes."

Then on page 78 TR.:

"Q. As I understood you awhile ago when Al told you he was going to give you his half interest in the sawmill you were very much pleased?
A. At that time.
Q. You did make some statement to him that you were very well pleased?
A. Yes, at that time.
Mr. Bell. That is all.
The Court. Any re-direct?"

Then on page 80 TR.:

"Q. Was it, or was it not your understanding at one time that you were to have this sawmill for your wages?
A. Yes."

And then on pages 71 and 72 TR., you find these proceedings:

"Q. Did Mr. Heady tell you that the mill had served its purpose so far as he was concerned, that he just wanted it to saw logs and lumber to build the hotel?
A. I couldn't say.
Q. Was there something like this?
A. I couldn't say definitely.
Q. I will ask you if he didn't say to you, 'I will give you my half interest in that sawmill. It can serve no purpose to me, and it will be a benefit to you,' and if you didn't say, 'Well, it's

just like a gift from God, you don't owe me anything, and I sure appreciate it'?

A. No, sir. Mrs. Heady wasn't there.

Q. I asked you if you didn't say that to Al?

A. I don't recall the words.

Q. Did you say it was a gift from God?

A. No, I knew it wasn't.

Q. Or a gift from heaven?

A. No.

Q. What were the words you said that it was just a gift?

A. I didn't say it was a gift.

Q. What words did you use to Mr. Heady?

A. I said I would be satisfied with that arrangement.

Q. Didn't you add to that these words, 'Al, you don't owe me anything, and I sure appreciate it'?

A. Maybe I said that after he gave me the sawmill, they wouldn't owe me."

ARGUMENT.

For the purpose of this brief, appellants will consolidate for argument, statement of points 8, 9, and 10, relied upon for reversal, which are as follows:

No. 8. The Court erred in not sustaining the defendant's motion to dismiss the case at the close of plaintiff's evidence.

No. 9. The Court erred in overruling the defendants' motion to dismiss at the close of all of the evidence.

No. 10. The Court erred in submitting on a *quantum meruit* instruction when the action was based upon an exact, explicit contract which was not proven.

As all of the cases cited under this heading apply to some, or all of these three points of error.

It will be remembered that the plaintiff filed a complaint for the recovery of money based upon *a specific contract for the stipulated wage of $2.00 per hour, for each and every hour so worked by the plaintiff,* and in addition to the said $2.00 per hour, plaintiff was to receive board and lodging, from the defendant, which board was provided by the defendants. See complaint. (TR. 2.) Now this part of the complaint was specifically denied in the answer. (TR. 4, 5 and 6.) Then without any authorization, nor order to the Court, and with no permission having been granted by the Court, the plaintiff's attorney, R. J. McNealy, filed in the District Court, what purports to be a reply, which is more or less unintelligible, but it does say in the second paragraph (Emphasis ours):

> "No price for work was agreed upon, and the plaintiff understood he was to have going carpenter wages",

which is in direct contradiction and is a variance from plaintiff's complaint.

Assuming that the Federal Rules of Civil Procedure control, then we call your attention to Rule 7 (a), Title 28 U.S.C.A., at page 245, which reads as follows, to-wit:

> "Rule 7. Pleadings Allowed: Form of Motions. (a) There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948.*" (Emphasis ours.)

The Second Circuit Court of Appeals has construed this rule in the case of *Zydney v. New York Credit Men's Ass'n.*, 113 Fed. (2d) 986. The third syllabus reads:

> "Bankruptcy, key 212. Where petitioner filed a petition in reclamation against a trustee in bankruptcy, and trustee filed a so-called 'answering affidavit', *and referee had ordered no reply, none was permissible,* and a reply which consisted in part of argument and in part of new facts was not a proper reply, even if a reply had been ordered. Bankr. Act. pp. 1 (9), 21, sub. a., 11 U.S.C.A. pp. 1 (9), 44, sub. a.; General Order in Bankruptcy No. 37, 11 U.S.C.A. following section 53; Rules of Civil Procedure for District Courts, rules 7 (a), 8 (b), 28 U.S.C.A. following section 723c." (Emphasis ours.)

And in *Carpenter v. Rohm & Hass Co., Inc.*, 75 Fed. Supp. 732, the first syllabus reads:

> "1. Federal civil procedure, key 803, 870. Where reply and supplementary reply had not been ordered by the court, and where largely irrelevant and objectionable, they would not be allowed or considered. Federal Rules of Civil Procedure, rule 7 (a), 28 U.S.C.A. following section 723c."

and from the body of the opinion on page 733, we quote:

> "(1) The plaintiff then filed a 'reply to the answer', consisting of 31 paragraphs and a supplementary reply of 12 paragraphs. No reply to the answer or supplementary reply having been ordered by the court, and the reply and supplementary reply being largely irrelevant and objectionable so pursuant to Rule 7 (a), they are not allowed or considered."

This action being based upon specific contract, the law in the case of *Brightson v. H. B. Claflin Co.*, 72 N.E. 920, is very persuasive of appellant's position; quoted from the body of the opinion on page 921:

> "The objection was to the effect that the proof was a departure from the cause of action stated in the complaint. No amendment of the complaint was asked or allowed, and the question is not in respect to the power of the court to grant an amendment in such case, but as to the right of the plaintiff to recover for the breach of a contract for one year, based entirely upon an inference or implication of law."
>
> * * * * * * *
>
> *"If a party can allege one cause of action, and then recover upon another, his complaint will*

> *serve no useful purpose,* but rather to ensnare and mislead his adversary. The defendant by its answer made a distinct issue with respect to the contract stated in the complaint. It denied the making of any such contract, and, among other defenses, interposed the statute of frauds; expressly alleging that there was no note or memorandum in writing of the five-year contract. Under the authorities cited above, the defendant's objection to the proof at the trial should have been sustained, and the exceptions were well taken." (Emphasis ours.)

This is identical to the case at bar. Wherein the complaint alleged a cause of action upon specific and direct contract and then failed to prove it, never asked to amend, and no amendment was made and at the close of the evidence, defendants moved to dismiss, which motion should have been sustained.

Among the various authors discussing similar cases, there is a very definite statement in Bancroft's Code Pleadings with Forms, I, at page 984, paragraph 700, a part of which reads:

> "Par. 700: Allegations and Proof must Correspond: It is elementary law that the proof must correspond to the allegations. The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs. *A judgment cannot be sustained unless the proof establishes the cause of action alleged in the complaint,* even though a different cause of action be fully proved." (Emphasis ours.)

The Supreme Court of Washington in the case of *Clark v. Sherman,* 32 Pac. 771, settled the rule in that state, which seems to be almost, if not the universal rule throughout the United States. The first two, and only, syllabus read, as follows:

> "Pleading and Proof-Variance-Reply. 1. An action for money had and received is not supported by proof that defendant is liable on a contract by which he agreed to pay plaintiff the amount of money sued for. Distler v. Dabney, 28 Pac. Rep. 335, 3 Wash. St. 200, followed.
>
> 2. Plaintiff cannot recover, though her real cause of action is set out in her reply, since a plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover on an entirely different cause of action."

And from the body of the opinion on page 771, you find the following statement:

> "Plaintiff seeks to avoid the effect of that decision, by showing that her real cause of action is disclosed by the answer and reply, and that she ought to be allowed to recover on that account. We cannot sustain this contention. A plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover upon an entirely different cause of action. The judgment must be reversed, and the cause remanded, with instructions to sustain the motion of the defendant for a nonsuit."

Another case directly in point is found in 110 N.E. Rep. 426, *Walrath v. Hanover Fire Ins. Co.,* the third syllabus reads:

"Judgment, key 249—Conformity to Complaint. Plaintiff must recover on the facts stated in his complaint; and it proceeding on a definite and certain theory, will not support a judgment on another theory, though containing isolated or subsidiary statements consistent therewith."

Then over in the body of the opinion on page 427, you find this statement:

"(3) It is fundamental that in civil actions the plaintiff must recover upon the facts stated in his complaint, or not at all. In case a complaint proceeds on a definite, clear, and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith. A party must recover not only according to his proofs, but according to his pleadings. Northam v. Dutchess Co. Mut. Ins. Co., 177 N.Y. 73, 69 N.E. 222; Canton Brick Co. v. Howlett, 169 N.Y. 293, 62 N.E. 347; Brightson v. Claflin Co., 180 N.Y. 76, 72 N.E. 920; Southwick v. First Nat. Bank of Memphis, 84 N.Y. 420."

The Eighth Circuit Court of Appeals in the case of *Union Pacific R. Co. v. Garner,* 24 Fed. (2d) 53, had the same question before it and there upheld our contention here, and on page 54 from the body of the opinion, we quote:

"It will be observed from the foregoing that the plaintiff predicated her right to recovery upon a theory which was entirely disproved by her evidence. The court, however, submitted the case to the jury upon a theory not found in the plead-

ings and not within the issues raised by the answer.

Defendant objected to such a submission at the trial, and presses the same matter as its complaint in this court. The rule is too well settled to require the citation of authorities that instructions should be confined to the issues made by the pleadings. There is nothing in the instant case to bring it within the exception to that well established rule. The defendant did not join issue with the plaintiff upon any other theory, nor was the case tried by the parties upon any other theory.

The judgment should be reversed, and the cause remanded for a new trial. It is so ordered."

The United States Supreme Court passing on a similar question in the case of *Washington Railroad v. Bradleys,* 77 U.S. Rep., 299, and from the body of the opinion on page 303, we quote, as follows:

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court, can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

In *Northan v. Dutchess County Mut. Ins. Co. of Poughkeepsie,* found in 69 N.E. 222, from the body of the opinion we quote as follows:

"In this case the plaintiff failed to prove the cause of action alleged, and the evidence tending

to establish a different cause of action was objected to upon the ground that it was inadmissible under the pleadings, and no amendment was asked for. In such a case, if the plaintiff fails to prove the cause of action set up in his complaint, and proper objections are made upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in the plaintiff's favor upon a cause of action not alleged cannot be sustained on appeal, nor after trial can the pleadings be conformed to the proof. Southwick v. First Nat. Bank of Memphis, 84 N.Y. 420; Truesdell v. Saries, 104 N.Y. 164, 167, 10 N.E. 139; Pope v. Terre Haute Car & Mfg. Co., 107 N.Y. 61, 13 N.E. 592; Freeman v. Grant, 132 N.Y. 22, 28, 30 N.E. 247; Reed v. McConnell, 133 N.Y. 425, 434, 31 N.E. 22; Bradt v. Krank, 164 N.Y. 515, 519, 58 N.E. 657, 79 Am. St. Rep. 662. Therefore it is manifest that the learned trial court erred in admitting, under the defendant's objection and exception, evidence of the verbal agreement between the parties, and also in submitting the case to the jury upon the theory that the plaintiff might recover if the jury should find that such an agreement was made. The defendant's exceptions to the admission of that evidence and to the charge of the court in that respect were well taken, and require a reversal of the judgment."

In the case of *Southern Ry. Co. v. Montgomery,* at 46 Fed. (2d) 990, from the body of the opinion on page 991, we quote as follows:

"It is well settled that in federal courts a plaintiff can recover only on the allegations of his

> pleadings and cannot recover on some other act incidentally appearing in the proof. Hines v. Jasko (C.C.A.) 266 F. 336; Union Pac. v. Garner (C.C.A.) 24 F. (2d) 53; Wash. Railroad v. Bradley, 77 U.S. (10 Wall.), 299, 19 L. Ed. 894. It follows that the instruction was misleading and erroneous."

The Circut Court of Appeals for the Third Circuit reiterates this statement of the law in the case of *John S. Sills & Sons, Inc. v. Bridgeton Condensed Milk Co., et al.,* 43 Fed. (2d) 72, and the second syllabus reads:

> "Pleading key 48, 387. Plaintiff must state complete case in complaint and prove same as stated."

And from the body of the opinion, on page 73, we quote as follows:

> "The plaintiff must state his complete case in his complaint and prove the case, as stated in his complaint."

Federal Rules of Civil Procedure 7 (a) is very definite and certain and amounts to a reiteration of the old Section 723 (c), 28 U.S.C.A., and very recently, and since the adoption of the rules, the U. S. District Court in Connecticut has occasion to pass on this question, and the opinion was affirmed, February 5, 1943. This case is *Middle West Const., Inc. v. Metropolitan Dist.,* 2 F.R.D. 117, and the first syllabus reads:

> "1. Courts Key 347 (4). A reply by plaintiff and a rejoinder by defendant being unauthorized in federal civil pleading cannot be considered except as they constitute admissions against interest of the parties. Federal Rules of Civil Procedure rule 7(a), 28 U.S.C.A. following section 723c."

and in the body of the opinion on page 117, the Court held:

> "(1) 2. Plaintiff's complaint contains a specification in extenso of plaintiff's several claims, and defendant's answer gives defendant's position with regard to each one thereof. A reply by plaintiff and a rejoinder by defendant, being unauthorized in federal civil pleading, Federal Rules of Civil Procedure, 7(a), 28 U.S.C.A. following section 723c, cannot be considered except as they constitute admissions against interest of the parties;"

This is cited to support appellant's contention that the Federal Rules of Civil Procedure do not change the general and well-settled rules as cited above in Bancroft's Code Pleading.

In the case of *San Francisco Stevedoring Co., et al. v. Associated Industries Ins. Corp.,* 29 Pac. (2d) 890, the District Court of Appeal decided and the Supreme Court upheld them in these words:

> "Plaintiff must recover on cause of action set out in complaint, and not on another cause developed in proof".

It must be born in mind that when the case at bar was on trial and the testimony was being introduced, and the plaintiff was on the stand, and he attempted to change his cause of action from that of direct and specific contract to one of *quantum meruit*. The defendants objected to this testimony and the trial Court made the statement:

> "That is the way it was pleaded in the complaint. The reply may * * *" Then overruled the objection.

That matter was objected to all the way through and at the close of the plaintiff's testimony, the defendants moved the Court to instruct the jury to return a verdict for the defendants, while the wording used in the motion, as is shown by the record on page 86, was not exactly as it should have been for a motion to dismiss, however, the Court by hearing the arguments and by the motion itself clearly understood the defendant's contention, and the plaintiff having emphatically testified that he had no such contract, then the Court should have dismissed the plaintiff's cause of action for failure of proof, as well as variance, and as set forth in the U. S. Supreme Court case of *Washington Railroad v. Bradleys,* 77 U.S. 299. Wherein this great Court said:

> "Nor will the fact that objection was not made below, cure a combination of errors so large and so grave as above indicated."

It was the Court's duty to take cognizance of the fact that the plaintiff absolutely failed to prove his

case, and by the objections to the testimony, made by the defendants throughout the hearing, some of which can avail us nothing here, due to the fact that the court reporter taking this case was not the official court reporter, but was called in for assistance, and while doing the best she possibly could, under the circumstances, did not get all of the objections and statements. However, she did get enough in the record to show specifically the contention of the defendants throughout the entire trial.

The plaintiff having sued on a direct and specific contract should not be permitted to recover on a *quantum meruit* theory, by evidence introduced over defendants' objections and this is especially true since he never even asked to amend his complaint.

We will now group statements of points, Numbers 2 and 3 for argument, which are as follows:

> "2. The verdict as rendered was not supported by sufficient evidence, but was directly contrary to the evidence."
>
> "3. The verdict as rendered was against the law."

We will submit these two statements of points on the law and facts set forth above. We have not set forth all of the plaintiff's testimony, but have set forth enough to clearly show that he admitted that there was no contract as sued on in this action.

We will next present statement of points, Number 4, which is as follows:

"4. The Court erred in allowing incompetent evidence to be introduced on the part of the plaintiff, over the objections of the defendants, as shown by the transcript of the testimony and the Court proceedings."

The testimony specifically objected to commences on page 39 TR., and extends down near the bottom of page 40, which is as follows:

"Q. Prior to the time you went to work for the Headys, for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter. (6.)

Q. You have stated, I believe, that you have twenty years experience as a carpenter?

A. Yes, sir.

Q. How much per hour, if you remember, did Squeaky Anderson pay you?

Mr. Bell. Object as incompetent, irrelevant and immaterial. This is not on a suit quantum meruit, but on a direct contest, so pleaded.

The Court. That is the way it was pleaded in the complaint. The reply may——

Mr. McNealy. Your honor, in the reply we did state that there was no actual price agreed upon. It was an error on my part in drawing the complaint in stating that there was a stipulated amount.

The Court. What is the purpose of this question, to prove the going carpenters wages?

Mr. McNealy. Yes.

Mr. Bell. That wasn't the question.

The Court. The objection is overruled.

Q. (by Mr. McNealy). Go ahead and answer the question.

(Testimony of Lawrence E. Slavin.)

A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenters wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your honor, I move to strike the answer as (7) not responsive to the question, and further that it is outside the pleadings and not within the issues.

The Court. Motion is denied.

Q. Where did you perform this work for Squeaky Anderson?

A. There at the cannery in Seldovia.

Q. Seldovia, Alaska?

A. Yes.

Q. How far is Seldovia from Homer, Alaska?

A. Approximately sixteen miles.

Q. Just across the bay?

A. Just across the bay.

Q. Just across the bay there?

A. Yes.

Q. When you went to work for Mr. and Mrs. Heady, did you expect to get paid?

Mr. Bell. I didn't catch that question.

The Court. Will the reporter read the question, please.

(The reporter read the question.)

Mr. Bell. I object as calling for a conclusion.

The Court. The objection is sustained.

Q. Were you paid?

A. No."

Then again on page 43 TR.:

"Q. What time of the year was that?

A. In October, right after I started working.

Q. By your work for the defendants, Mr. and Mrs. Heady, did they get into the hotel any sooner than they would otherwise?

Mr. Bell. Objection, calling for a conclusion of the witness.

The Court. Overruled.

Q. Did they, by reason of your work, get into the hotel sooner than they would otherwise?

A. Yes.

Q. How much sooner, if you know?

A. I couldn't say definitely, but three or four months no doubt."

Then on page 79 TR., on re-direct of the plaintiff you find the following proceedings:

"Q. Answer this yes or no. Did Mr. Heady endeavor to dump this sawmill into your lap to pay you for your wages?

Mr. Bell. Object as incompetent, irrelevant and immaterial, not within the pleadings.

The Court. It may be irrelevant and immaterial, but it is not a proper question.

Q. Did you ever get a bill of sale to the mill?

Mr. Bell. Objected to. It has been asked and answered.

The Court. Only by answer to question put by counsel for defendants. Overruled.

A. No, I never did."

Again on page 83 TR.:

"Q. Was this planer offered as a part settlement, or full settlement?

A. I understood as part settlement.

Q. What was it offered for? This labor claim?

Mr. Bell. Object to him leading the witness.

The Court. Objection sustained. You can tell what was said.

Q. Was this planer offered as a seven hundred dollar payment on this twelve hundred dollar claim?

Mr. Bell. Object to that.

The Court. It is a leading question. After all, the jury is competent to draw the conclusion as to how it was offered."

It is quite apparent that the plaintiff was given a judgment on the theory of *quantum meruit* and not on contract and all of the above evidence being objectionable, it should have been excluded and the permitting of this to go before the jury was error as is set forth in the cases cited under the first argument.

We will now group statements of points 14, 15, and 16 for argument, which are found on pages 32 and 33 TR., which are as follows, to-wit:

"14. The Court erred in adding the words in instruction 3, in the second line, as follows: 'or either of them,' over the objection of the defendants' counsel, as stated in the record, because there is no evidence of any agreement referred to only in the presence of both of the defendants.

15. The Court erred in adding to instruction 3, after it had finished reading all the instructions

to the jury, the words: 'going carpenter wages,' as shown by the transcript; by giving this added instruction, the Court inferred at least, 'going carpenter wages at Anchorage'. This was given over counsel for defendants objection, and at the instance and the request of the attorney for the plaintiff.

16. The Court erred in re-reading a part of the instructions as amended which included the words: 'at going carpenter wages,' and the Court further erred in adding an oral statement to the jury as follows: *'If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services, and as bearing upon that issue, you may take into consideration all the testimony relating to compensation paid for similar work under similar conditions.*

If you find that the agreement was entered into as claimed by the plaintiff in his complaint, *as modified by his reply,* and that he rendered services which he claims to have rendered, and that he has not been paid for such services, *then your verdict should be for the plaintiff, and against the defendant for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.'* This instruction being given orally at a late moment after the instructions had been read, was unfair to the defendants, *and clearly left the impression with the jury that the trial judge believed the plaintiff was entitled to recover."* (Emphasis ours.)

Before arguing this, I wish to quote from the transcript, commencing on page 129, to show that the learned trial judge by his actions, which were, of course, innocent of any intentional wrong, did lead the jury to believe that he was in favor of the plaintiff:

"The Court. Next thing in order is instructions to the jury.

Mr. Bell. Don't you think you could give instruction on that and on the idea that he did say you owe me nothing?

The Court. All the evidence is to be considered, but the defendant himself says——

Mr. Bell. But the statement that you owe me nothing and it is just a gift from heaven.

The Court. It is all before the jury.

Mr. Bell. Mr. Neskett has drawn it out in his argument.

The Court. I couldn't do that.

Mr. Bell. Let me see it before——

The Court. Oh yes, let me read this. I don't believe I could, but have you a copy of the proposed instruction?

Mr. Nesbett. Not of this one.

The Court. Copy can be given later. I don't intend to give it.

Mr. McCarrey. Exception.

The Court. Ladies and gentlemen, I will now read the instructions.

(Instructions to the jury are read by the Court.)

The Court. And I have signed the instructions as district judge. Counsel may come to the bench with the reporter.

Mr. Nesbett. I want an objection, or rather an exception, to the first paragraph of No. 3, the second line, that it should be 'defendants, or either of them', that particular wording.

The Court. All right, I shall insert that 'defendants, or either of them.'

Mr. Bell. I object to adding that, because there is no evidence of an agreement referred to only in the presence of both of them.

The Court. Exception is noted.

Mr. Nesbett. I thought the words 'going carpenters' wages' should be inserted somewhere in line 7, 8 or 9.

The Court. I will put that between 6 and 7 'at going carpenters' wages'.

Mr. Bell. Now, that would be in Homer, Alaska. It wouldn't certainly be here.

The Court. I will put a comma after wages. It would read, 'would be compensated by defendants therefor, at going carpenters' wages'.

Mr. Bell. I want to specifically except to that on the issue as it now stands complete, it infers going carpenters wages at Anchorage, and does not infer going carpenters' wages at Homer, where it was performed.

The Court. All right.

Mr. Nesbett. In another part of the instruction you say this constitutes all the testimony?

Mr. Bell. At Homer, not at Anchorage.

The Court. Suppose I insert 'at Homer, Alaska,' at that point?

Mr. Nesbett. I don't see that it should be limited to Homer.

Mr. McCarrey. I would like to point out the fact that there is quite a little evidence even by

the plaintiff that economic conditions at Homer are not so good as elsewhere, so I take exception to that being other than Homer, Alaska.

The Court. The testimony was just going carpenter's wages not particularly at Homer, Alaska.

Mr. McCarrey. Exception.

The Court. All right, Mr. Bell.

Mr. Bell. I want an exception to the first paragraph of instruction 3, for the reason that it does not state the law carefully, and places too great a burden on the defendants, and is misleading to the jury.

I want the same exception to paragraph 2 of instruction 3, commencing on line ten on instruction 3, for the same reason.

I would like an exception to the third paragraph of instruction 3 which commences on line fifteen, and extends down to and including line twenty-two; and

An exception to the fourth paragraph of instruction 3, commencing on line twenty-three, and ending on line thirty-two, for the reason that all of these instructions misstate the law probably applicable to this case, and places too great a burden on the defendants, and is based only upon the plaintiff's contention in the case, and the defendants' contentions having been completely ignored.

Mr. McCarrey. It has been ignored—that is defendants' theory of the case has been ignored, in that defendants' theory has been that it was an *agreement entered into at the time that the work began, that is the determining factor and not the reasonable value of services, or the going wages.*

The Court. *I think that maybe the last part of the last paragraph should be amended, '* * * for if you find that the agreement between the parties was to the effect,' after the word 'compensation.'*

Mr. Bell. *On line twenty-nine?*

The Court. Yes, after the word 'compensation,' I think probably this language ought to be inserted, 'or if in your minds the evidence is equally balanced between the plaintiff and the defendants on this question.'

Mr. Bell. Now, your honor, I want to keep this one. There is one other here that I want to take. I take exception to instruction 7 in its entirety, for the reason that it deprives the jury of a method of reasoning the amount due, and if they do arrive at an amount by striking lots it would still have to be concurred in by all of the parties before it would be their verdict, and therefore it places too great a burden on the defendants in this case.

The Court. I don't know whether that word should be—I will strike out 'the compensation agreed upon,' that is before the words 'for his service.'

Mr. Nesbett. Strike out the word 'reasonable.'

The Court. Yes. Do you want to take any further exceptions?

Mr. Bell. None whatever, but I do want to offer that.

The Court. The Court refuses to give the instruction No. 1 submitted by the defendants except as some parts of it may conceivably be included in the instructions. It is denied as submitted.

The Court. Ladies and gentlemen, since reading the instructions there have been changes, and I will now read it:

'The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants or either of them agreed that plaintiff should work for the defendant in the construction work described in the pleadings and in the testimony and would be compensated by defendants therefor, *at going carpenters' wages, no exact amount of compensation having been agreed upon,* or whether plaintiff agreed to work for his board and lodging only.

If such agreement was made *as claimed by plaintiff,* then the plaintiff is entitled to the compensation agreed upon, for his services and as bearing upon that issue, you may take into consideration *all testimony relating to compensation paid for similar work under similar conditions.* If you find that the agreement was entered into as claimed by the plaintiff in his *complaint, as modified by his reply,* and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff is justly entitled to recover from the defendants for the services so rendered.

But unless the plaintiff has proved the averments of his complaint, as modified by his reply, by a preponderance of the evidence, your verdict should be for the defendants and against the plaintiff.' '' (Emphasis ours.)

The above quotations from the transcript show conclusively that the errors of the trial Court caused this unconscionable verdict to be rendered by the jury. It is almost impossible for an Appellate Court to conceive the great influence that the Honorable Anthony J. Dimond, the trial judge, really has over the opinions of the jurors, and this is especially true where the average jury is about half men and half women.

I doubt if anyone could read the transcript in this case without seeing that our learned trial judge was thinking of an action on *quantum meruit* and not on contract, and, in spite of defendants' efforts, he tried the whole case on that theory.

This is reflected through the instructions given.

STATEMENT OF POINT NUMBER FIVE.

5. The Court erred in refusing to strike out certain testimony on a motion of the defendants as shown by the transcript filed herein.

On page 40 TR. you find the following proceedings:

"A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenter's wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your honor, I move to strike the answer as not responsive to the question, *and*

further that it is outside the pleadings and not within the issues.

The Court. Motion is denied." (Emphasis ours.)

In support of this motion, it is not necessary to reiterate the things said above, or recite the case above set forth. It is clear to me and I trust I am able to make my position clear to this honorable Court, that the defendants were called upon to defend an action based solely upon contract as set out in the complaint on page 2 TR., wherein the plaintiff alleges that he rendered services *"at the special instance and request of the said defendants, and for the stipulated wages of $2.00 per hour for each and every hour so worked, by plaintiff, and in addition to said $2.00 per hour, plaintiff was to receive board and lodging from defendants, which board was provided by said defendants."* (Emphasis ours.)

It is so apparent that the trial judge was laboring under misapprehension of the issues of this case when he allowed the plaintiff to testify as above set forth, and then overruled defendants' motion to strike, when it became apparent that the witness was testifying about cannery wages, and not carpenter wages, and was testifying about cannery wages in an area especially busy in the summertime, and the Court should not have overruled defendants' motion to strike, and the overruling of the same constituted highly prejudicial error, as the only evidence of $2.00 per hour plus board and room that was given any-

where was the testimony above quoted. You will note that I again in this objection raised the question that:

"It is outside the pleadings and not within the issues." I submit this on the same cases cited above as they are in point here.

CONCLUSION.

In conclusion, permit me to state, for and on behalf of the defendants in this case, that an injustice has been done to the defendants. That an effort was made to correct it by a motion for a new trial, which motion was overruled.

This judgment, in my humble opinion, is a travesty on justice. While it is not so large in dollars and cents, it is very large as compared with the finances of my humble clients, and more often, errors are committed in the trial of small or less consequential cases than in the great cases involving fortunes.

The injustice done in this case is demonstrated so conclusively by the verdict, which must have been due to the confusion of the learned trial judge in permitting the trial to go ahead when the plaintiff failed completely to prove the allegations of his complaint and this trial judge, in refusing to dismiss the case, at the close of plaintiff's testimony, after the plaintiff himself had denied ever having any contract with the defendants as pleaded at all, or anything similar to it, or any contract at all, and contracts cannot be just perfected by someone's believing

that maybe sometime in the future that he would be paid for doing a little work while he was staying with the Headys, there being positively no contract to pay anything, even assuming that the plaintiff's testimony was true. The whole thing is so apparent that the jury became confused. The trial judge should never have submitted it to the jury, and should have dismissed the plaintiff's case at the close of all of the evidence.

You will note by the testimony that the plaintiff must not have been thinking that he would be paid for his work because he kept no record of it, and testified first that he worked six weeks. However, the plaintiff's attorney finally was able to get the plaintiff to admit, rather than testify, that he worked sixteen weeks of 40 hours per week, and at the same time, admitting no work on Thanksgiving, Christmas and holidays and no work during the time he was having his father's homestead surveyed out in the country; admitted that the days were cold and short; admitted that he told the Headys he had to have a place to stay until he was ready to go outside and that he didn't want to go for a while because he wanted to have his father's homestead surveyed; admitted that he never expected any pay for the first few weeks. (TR. 48.)

If you figure the time that he was in Homer and worked for the Headys as alleged in his complaint, he started to work on October 2, 1947, and the last day was the 23rd of January, 1948. If you take all of these days together, excluding the first and in-

cluding the last, you would have sixteen weeks. However, he stated he didn't expect any pay for the first few weeks. On page 57 TR., this question was asked and this answer made:

"Q. Did you work 40 hours between Christmas and New Year's?

A. I couldn't say definitely."

Then he stated later that he stayed at the Headys' home where he was boarded until he went outside about February 5, and then returned in the early spring with his nephew, had stayed with the Headys until he left to go fishing sometime in May, he believed. Then he was asked:

"Q. Did you pay them for the accommodations then?

A. I don't believe there was anything asked for that. They put up a couple of cots and we furnished our mattresses.

Q. Who stayed there with you?

A. My nephew."

Apparently the idea of Mr. Slavin's filing this suit was placed in his mind by the attorney who filed it. The fact that he waited almost two years before filing it, and the very fact that he never demanded pay from the Headys is an incident to be considered along with the many, many errors set forth above. Then again his statement set forth on page 48 TR. of the cross-examination of Mr. Slavin you find this question:

"Q. Those first few weeks you didn't intend to charge him?

A. I didn't think there was any charge."

Then again on page 47 TR. he testified as follows:

"Q. I believe you said Mr. Heady told you he had no money to pay you; that he and Tommy were just building it themselves?

A. I believe so.

Q. You did know that Mr. Heady had no cash to put in it?

A. At that time, yes."

And again on page 78 these questions and answers appear:

"Q. As I understood you a while ago, when Al told you he was going to give you his interest in the sawmill, you were very much pleased.

A. At that time.

Q. You did make some statement to him that you were very well pleased?

A. Yes, at that time."

Since there has been a travesty on justice perpetrated by misunderstandings and errors of the trial Court, this case should be reversed, and ordered dismissed, and if the plaintiff has any claim against the Headys based upon some other contention, than the one sued upon, he will have plenty of time to file his suit and the Headys will have an opportunity to meet that suit in Court when filed.

Dated, Anchorage, Alaska.
October 18, 1950.

Respectfully submitted,
BAILEY E. BELL,
J. L. MCCARREY, JR.,
Attorneys for Appellants.